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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARCELA PACALDO,

Plaintiff and Respondent,

v.

ROGER GROSS,

Defendant and Appellant.

A153070

(San Francisco County  
Super. Ct. No. CGC-17-558171)

Marcela Pacaldo (plaintiff) filed a malicious prosecution complaint against attorney Roger Gross. The trial court denied Gross's anti-SLAPP motion (Code Civ. Proc., § 425.16). Gross appeals, contending the court erred by determining plaintiff established a probability of prevailing. We agree and reverse. We conclude plaintiff's malicious prosecution claim fails because she did not make a prima facie showing of malice.<sup>1</sup>

FACTUAL AND PROCEDURAL BACKGROUND

In 2013, Angelina Pacaldo owned her residence, a condominium. She co-owned an auto body repair shop. Angelina was dating William Ayoubi. In February, Angelina met with Gross, an estate planning attorney. Angelina told Gross she had been diagnosed

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<sup>1</sup> "To establish a cause of action for malicious prosecution, a plaintiff must demonstrate that the prior action (1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice." (*Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 740.)

Undesignated statutory references are to the Code of Civil Procedure. We refer to plaintiff's family members by their first names for clarity.

with cancer and wanted to create an estate plan. In March, Gross sent Angelina drafts of a will, trust, and powers of attorney. Angelina called Gross in April. She told Gross she was thinking about the documents and “would get back to [him].”

On July 12, 2013, Ayoubi called Gross. Ayoubi said Angelina was in intensive care and “was nearing her end,” and that she wanted Gross “to come to the hospital so she could sign the documents [Gross] had prepared.” Gross and his legal assistant went to the hospital. With Gross’s assistance, Angelina signed the “Last Will & Testament of Angelina Pacaldo” (will) and the “Angelina Pacaldo Revocable Trust” (trust). The will named Ayoubi as executor; the trust named him as successor trustee and beneficiary. Angelina died two weeks later. She is survived by her mother—plaintiff—and siblings.

### *Trust Litigation*

In October 2013, Gross—acting on Ayoubi’s behalf—filed a petition for order confirming trust assets. The petition attached the trust and the property description for Angelina’s condominium. In November, the co-owner of the auto body repair shop filed a lawsuit against Ayoubi. The lawsuit alleged Ayoubi persuaded Angelina to transfer ownership of her shares of the auto body repair shop into an invalid trust naming Ayoubi as the beneficiary. Plaintiff intervened in that lawsuit, claiming Angelina was the owner of the shares. The court consolidated the cases (collectively, trust litigation).<sup>2</sup>

In December 2013, plaintiff contested the trust. According to plaintiff, Angelina lacked capacity to execute the trust because she was in the “end stages of Leukemia,” was “heavily medicated,” and her “cognitive abilities had deteriorated.” Plaintiff also alleged the trust was “made as a direct result of” Ayoubi’s undue influence and/or fraud over Angelina and therefore did not reflect Angelina’s “true intentions.” In February 2014, plaintiff contested the will on the same grounds. In late April, Gross substituted out as Ayoubi’s attorney. Another attorney represented Ayoubi.

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<sup>2</sup> In December 2013, Gross filed a petition to probate the will, and for an order naming Ayoubi as executor of Angelina’s estate. Plaintiff contested the will. The court deferred the probate matter until resolution of the trust litigation.

In November 2015, the court held a one-day bench trial—at which Ayoubi did not appear—and entered judgment for plaintiff. The court determined the will and trust were “ineffective and void as they were procured by undue influence” when Angelina “lacked capacity.” It found the will and trust, “purportedly signed on July 12, 2013, were procured by undue influence . . . . The actions of . . . Ayoubi and . . . Gross were such as to constitute excessive persuasion that overcame [Angelina’s] free will and induced her to do an act which she would not have otherwise freely done, and [that] resulted in inequity.”

In addition, the court determined Angelina “lacked the capacity” to execute the will and trust “based on her lack of alertness and attention, ability to concentrate, and ability to understand or communicate with others, which significantly impaired her ability to understand and appreciate the consequences of her actions with regard to the execution of a will or trust. . . . These deficits directly correlated to [Angelina’s] ability to form the testamentary intent to execute a will or trust. . . . At the time that [Angelina] allegedly executed the purported Will and Trust [she] lacked the mental capacity to comprehend the significance [of] these documents.”

The judgment summarized the evidence submitted at trial, including (1) hospital records showing Angelina “was severely ill, incapacitated and intubated” and that Gross “did not inform” hospital “staff of his intent to have [Angelina] execute a will and trust, but instead claimed to be there to obtain [Angelina’s] consent regarding medical treatment”; (2) testimony of Angelina’s sister, Sharon, who testified Gross’s visit “lasted a matter of minutes” even though the will and trust are 21 pages; (3) testimony of Angelina’s brother, Gilbert, who testified Gross did not read or explain the will and trust to Angelina, who “appeared to slip in and out of consciousness,” and that Gross “guide[d] Angelina’s “hand to secure her signature” on the documents; and (4) testimony of neuropsychologist Ronald Roberts, Ph.D., who opined Angelina lacked capacity to understand the “complex” estate planning documents and that her signatures were obtained “as a result of undue influence asserted over [her] by . . . Ayoubi.”

*Malicious Prosecution Lawsuit and  
Anti-SLAPP motion*

Plaintiff filed a malicious prosecution complaint against Gross. The first amended complaint (complaint) alleged Gross lacked probable cause to initiate the trust litigation because “he did not know if [Angelina] had reviewed the Will and Trust or if she had decided upon its terms and it was evident when he manipulated Angelina’s hand to unlawfully obtain her signature that she lacked the mental and physical capacity to execute the Will and Trust.” The complaint also alleged Gross acted with malice because he initiated the trust litigation without probable cause and “with the improper motive of denying [plaintiff’s] rights as the sole heir of . . . Angelina . . . to the benefit of his client [Ayoubi,] and for the purpose of personally benefitting . . . by collecting attorney’s fees in connection with litigating the improper petitions.” Plaintiff sought compensatory and punitive damages.

Gross filed an anti-SLAPP motion. As relevant here, Gross argued plaintiff could not show a probability of prevailing, i.e., that he lacked probable cause to initiate the trust litigation. Gross argued any reasonable attorney “would have thought [Angelina’s] probate claims [were] tenable when they were filed.” Gross also contended plaintiff could not establish malice.

In a lengthy supporting declaration, Gross averred he met with Angelina in February 2013. During that meeting, Angelina said she had no relationship with plaintiff—who she described as “extremely difficult and self-centered.” Angelina told Gross she did not want plaintiff “to be involved with her estate, either as a personal representative or as a beneficiary.” Angelina told Gross she “was undergoing aggressive treatment” for cancer and was living with her boyfriend, Ayoubi, with whom she was “very close.” Ayoubi was Angelina’s primary caregiver; Angelina was “very pleased” with his care. Angelina discussed her testamentary wishes with Gross. In March, Gross sent Angelina the estate planning documents. In April, Angelina told Gross “she was thinking about the documents” and “would get back to [him].”

On July 12, 2013, Gross received a call from Ayoubi. It “was the first time” Gross had spoken with him. Ayoubi said Angelina was hospitalized and near death, and that “she instructed him to call [Gross] to come to the hospital so she could sign the documents [Gross] had prepared for her.” Ayoubi told Gross that Angelina could not speak but that she “communicated with him by hand-written notes,” including a note that prompted him to call Gross. “The note states: ‘I NEED YOU THE YELLOW ENVELOPE [] FROM ROGER ASAP HURRY HURRY.’ ”

Gross put the estate planning documents in “ ‘signature ready’ ” form and went to the hospital with his assistant. At the hospital that same day, Gross and his assistant met Ayoubi for the first time. Plaintiff was in the waiting room. Gross told plaintiff he was not Ayoubi’s attorney and “had never met [him] before that day.” Gross said he met with Angelina in February 2013 and had prepared estate planning documents at her request. Gross explained that he had “come to the hospital at [Angelina’s] request so that she could sign” the documents.

Gross went into Angelina’s hospital room alone. Angelina was intubated and had “needles in her arms for i/v solutions.” She could not speak but her “eyes were clear and extremely expressive. . . . Upon looking at [Gross] her eyes opened wide and she acknowledged [his] presence with a move of her head and by enlarging her opened eyes.” When Gross explained why he was at the hospital, Angelina “nodded her head affirmatively.” Gross told Angelina “the documents were exactly the documents that [he] had sent her for her review.” He reviewed the documents with Angelina. When Gross asked Angelina, “ ‘Are you ready to sign documents?’ she nodded her head affirmatively.”

Gross used his briefcase as a surface for Angelina to sign the documents. He gave Angelina “a pen, and guided her hand to the signature line. At that point she would sign. Each time [Gross] placed the pen in her fingers, she aggressively grabbed the pen and signed the document immediately.” Gross “was surprised at her strength and her vigor and the speed with which she signed her name. There was no hesitation on her part; her desire to sign each document was clear.” After Angelina signed several documents, a

nurse informed Gross that hospital protocol required a doctor to meet with the patient before documents were signed “to be sure the patient is competent and able to sign.” Gross “stopped the signing process” and left the room so Angelina’s doctor “could meet with [her] alone. Several minutes later the doctor came out of the room, and told [Gross] that [Angelina] was competent and able to sign.” Gross returned to Angelina’s room, and she signed the remaining documents.

Before leaving the hospital, Gross spoke with plaintiff, who wanted copies of the executed documents. Gross declined because Angelina had not authorized him to make this disclosure and because Angelina was alive and could change the documents. Angelina died two weeks later, on July 24, 2013. About a week later, Ayoubi retained Gross to help administer Angelina’s estate. Gross filed the probate documents on Ayoubi’s behalf. After plaintiff contested the will and trust, Gross told Ayoubi that he could not represent Ayoubi because he was “not a litigator” and because he was “a witness to these contested events.” He substituted out as Ayoubi’s attorney and had no further knowledge of, or participation in, the trust litigation. Another attorney represented Ayoubi.

Gross averred: “At all times it has been my belief that [Angelina] was competent when she signed” the will and trust and “[i]t is my firm belief that they reflected her testamentary wishes and goals. At no time did I form the belief that [Angelina] was unable to understand the nature of her testamentary act or the nature and situation of her property.” Gross stated: “I have never felt any ill will or animus toward [plaintiff] nor did I ever act in any way intended to cause her harm.” Gross’s declaration attached several documents, including (1) notes Gross made during his initial consultation with Angelina; (2) Angelina’s note summoning Gross to the hospital; and (3) a memo Gross wrote on July 15, 2013 summarizing his interaction with Angelina and her family at the hospital. Gross’s assistant submitted a similar declaration.

### *Opposition to Motion to Strike*

Plaintiff's opposition argued she was likely to prevail because Gross brought the trust litigation without probable cause, and with malice. According to plaintiff, the judgment established Gross "acted improperly" by inducing Angelina to sign the will and trust, and that those documents were void. Plaintiff also argued Gross acted with malice because he "filed and prosecuted an untenable claim. He had no idea whether [Angelina] had read or agreed to the probate documents he affixed her signature to, which contained blanks and incomplete information. There are no medical records indicating he cleared her mental status to review and understand probate documents with the [hospital] staff . . . . Gil Pacaldo saw Gross obtain [Angelina's] 'signatures' improperly, apparently for the benefit of his . . . client." According to plaintiff, Gross "fabricated" evidence to support the trust litigation, which supported a finding of malice.

Plaintiff submitted pleadings from the trust litigation, including the judgment. She also offered a July 12, 2013 "progress note" from Angelina's treating physician. The note stated: "I walked into the patient's room this afternoon to find Ms. Pacaldo's lawyer at the bedside; he noted that they had had a long discussion regarding decision making. He noted that the patient wanted to have her boyfriend (she is not married) making decisions for her were she not able to make any decisions. I then asked the lawyer to step out of the room and she reaffirmed these wishes. I assessed her ability to make such decisions; she was wide awake, following commands, and had complete understanding of her medical condition, including how grave her prognosis was; although she was not able to speak, her acknowledgments at the appropriate times were clear. Therefore in my opinion she has a clear ability to make decisions for herself."

Plaintiff also submitted supporting declarations from Angelina's siblings. Angelina's brother, Gilbert, described the progression of Angelina's cancer. By July 12, 2013, Angelina was "barely able to stay awake" and "could often not follow a conversation." She "did not have the strength to readily lift her right hand" and "she appeared not to recognize people's faces, let alone understand any writing." Gilbert observed some of Gross's interaction with Angelina on July 12. According to Gilbert,

Angelina “was very close to nonresponsive in that her eyes were glazed, she did not nod or give any other indication of agreement.” Gross put a pen in Angelina’s hand. Her “head was starting to tilt to the side, apparently as if she was falling asleep. She moved her hand on her own for the first . . . signature he obtained.” After the first signature, Angelina was unresponsive.

Gross “then rapidly flipped some of the pages he was holding and placed the new page in front of Angelina.” Without an explanation, Gross asked Angelina to sign. “She moved her hand toward the page, but did not reach it. He then took her hand, making sure the pen stayed in it, and guided her hand across the page in writing-type motions.” Gross repeated this process once more. According to Gilbert, the “entire process of . . . displaying the pages to Angelina and having marks put on the pages . . . was less than two minutes.”

Angelina’s sister, Sharon, averred plaintiff began living with Ayoubi in June 2012. Angelina was “very sick and was frequently tired and confused.” Ayoubi isolated Angelina from her family and friends. Angelina seemed afraid of Ayoubi. Angelina never told Sharon “it was her intent to sign a Trust and Will . . . assigning all her assets to Ayoubi.” According to Sharon, “when it became clear [Angelina] would not survive, [Ayoubi] decided to have . . . Gross come to the hospital and bring [Angelina’s] papers with him.”

Plaintiff also offered a 11-page declaration from neuropsychologist Ronald Roberts, Ph.D. Roberts examined Angelina’s medical records and opined that when Angelina signed the will and trust, she “was incapacitated and completely dependent on others for all of her care. She was intubated and could not speak. She was paralyzed on the left side of her body. She was under the influence of multiple medications including anesthetic and narcotic medications. This made her extremely vulnerable to undue influence.” According to Roberts, Angelina was “manifesting advanced signs of brain impairment.” He opined it was “more probable than not that [Angelina] was . . . suffering from dementia” and was “not competent to sign a will or enter into a trust.”



Roberts reviewed the progress note from Angelina's treating physician. According to Roberts, the note indicated the doctor "spoke with [Angelina] about her understanding of her medical condition. There was no indication that the doctor had any understanding as to the actual reason for . . . Gross's visit" or "any knowledge about [Angelina's] capacity to sign a will or a trust." Roberts observed "Gross spent a maximum of about 10 minutes with [Angelina]" and that "some of this time was interrupted by [the doctor]." Roberts opined: "I have read the will and the trust allegedly signed by [Angelina] . . . . It took me 30 minutes to read through the documents. In my opinion, it is more probable than not, that [Angelina] could not have been competent to understand the documents or sign a will or a trust under the circumstances."

#### *Reply*

In reply, Gross argued plaintiff failed to offer admissible evidence supporting her malicious prosecution claim. Gross claimed he had no knowledge of Ayoubi's alleged undue influence over Angelina when she signed the will and trust; he claimed he was entitled to rely on the presumption that Angelina was of sound mind when she signed those documents. After Gross "reached the conclusion that it was [Angelina's] wish to sign [the documents] and was advised by a physician that she was competent," Gross was "obligated to carry out [Angelina's] wishes in going forth with the petitions."

Gross also contended plaintiff could not establish malice. He pointed to the lack of admissible evidence supporting plaintiff's theory that he was part of a scheme to procure Angelina's signature. Gross acknowledged the court could take judicial notice of the entry of the judgment against Ayoubi in the trust litigation, but "not . . . of the truth of any factual findings made therein." Gross also argued the findings in the judgment were hearsay and "should not be considered as presumptive evidence or fact in the instant matter." Gross objected to Sharon, Gilbert, and Roberts's declarations, and to the judgment.

#### *Order Denying the Anti-SLAPP Motion*

The court held a hearing and denied the anti-SLAPP motion. It determined the complaint implicated petitioning activity but that plaintiff established a probability of

prevailing. As the court explained, plaintiff prevailed in the trust litigation, where the court determined “the estate planning documents were unenforceable. The Court can take judicial notice of the effect of that ruling. Plaintiff presents evidence that the prior action lacked probable cause. . . . Gilbert Pacaldo declares that he witnessed Mr. Gross put the pen in [Angelina’s] hand and sign for her even though she was in a catatonic state. Based on this evidence, Mr. Gross had no reasonable cause to believe that [Angelina] had the capacity to execute the testamentary documents. Plaintiff presents evidence of malice. Malice exists where the person initiating the claim does not believe it to be valid. In this case, Gilbert Pacaldo’s declaration indicates that Mr. Gross did not believe the probated documents to be valid.”

The court did not explicitly rule on Gross’s evidentiary objections. Instead, it determined plaintiff established a probability of prevailing “[e]ven if the Court agrees with . . . Gross that the Court cannot take judicial notice of the truth of the Court’s . . . prior findings in the underlying litigation and that the declaration of Dr. Roberts is inadmissible as hearsay that does not meet the former testimony exception.”

## DISCUSSION

### I.

#### *General Principles*

“ ‘Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success.’ ” (*Sweetwater Union High School Dist. v. Gilbane Building Co.* (2019) 6 Cal.5th 931, 940 (*Sweetwater*)). Gross concedes the malicious prosecution action arose from protected activity.

“To establish a probability of prevailing, the plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ ” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

“[E]vidence may be considered at the anti-SLAPP motion stage if it is reasonably possible the evidence . . . will be admissible at trial.” (*Sweetwater, supra*, 6 Cal.5th at p. 947.) “ ‘The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff’s evidence as true, and evaluates the defendant’s showing only to determine if it defeats the plaintiff’s claim as a matter of law.’ ” (*Id.* at p. 940.) “ ‘We review de novo the grant or denial of an anti-SLAPP motion.’ ” (*Ibid.*)

## II.

### *Plaintiff Failed to Establish a Probability of Prevailing*

“ ‘Malicious prosecution is a disfavored action. [Citations.] This is due to the principles that favor open access to the courts for the redress of grievances.’ ” [Citation.] ‘[T]he elements of the [malicious prosecution] tort have . . . been carefully circumscribed so that litigants with potentially valid claims will not be deterred from bringing their claims to court by the prospect of a subsequent malicious prosecution claim.’ ” (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 216 (*Daniels*)). To establish a malicious prosecution claim, a plaintiff must demonstrate the “prior action (1) was initiated by or at the direction of the defendant and legally terminated in the plaintiff’s favor, (2) was brought without probable cause, and (3) was initiated with malice.” (*Siebel v. Mittlesteadt, supra*, 41 Cal.4th at p. 740.) Here, the trust litigation was terminated in plaintiff’s favor. Without deciding the issue, we will assume Gross initiated the trust litigation without probable cause. We conclude plaintiff’s malicious prosecution claim fails because she did not make a prima facie showing of malice.

In the context of a malicious prosecution claim, malice refers to an “ ‘improper purpose’ ” for bringing the prior action. (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1407.) “ ‘The plaintiff must plead and prove actual ill will or some *improper* ulterior motive.’ Improper purposes can be established in cases in which, for instance (1) the person bringing the suit does not believe that the claim may be held valid; (2) the proceeding is initiated primarily because of hostility or ill will; (3) the

proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property; or (4) the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim.” (*Daniels, supra*, 182 Cal.App.4th at pp. 224–225.)

The complaint alleged Gross acted with malice because he “lacked probable cause” to initiate the trust litigation. We have assumed—without deciding—that Gross lacked probable cause. But “lack of probable cause in the underlying action, by itself, is insufficient to show malice.” (*Daniels, supra*, 182 Cal.App.4th at p. 225.) “Merely because the prior action lacked legal tenability, as measured objectively. . . , *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor’s subjective malicious state of mind.” (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498–499.)

The complaint also alleged Gross acted with malice because he initiated the trust litigation “with the improper motive of denying [plaintiff’s] rights as the sole heir of . . . Angelina . . . to the benefit of his client [Ayoubi,] and for the purpose of personally benefitting from this malicious act by collecting attorney’s fees in connection with litigating the improper petitions.” No evidence supports this allegation. In opposition to the anti-SLAPP motion, plaintiff offered declarations from Angelina’s siblings, Sharon and Gilbert, who described Angelina’s medical condition, and the interaction between Gross and Angelina as the estate planning documents were signed. Plaintiff also offered a declaration from Roberts, who opined Angelina lacked the capacity to understand the estate planning documents when they were signed.

We will assume the declarations would be admissible at trial, and we accept the evidence as true (*Sweetwater, supra*, 6 Cal.5th at pp. 940, 947), but even when viewed in the light most favorable to plaintiff, they do not support an inference of malice. (*Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal.App.4th 660, 688, overruled on another ground in *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1239.) The declarations shed no light on Gross’s state of mind when the estate planning documents were executed, nor his subjective intent when he initiated the trust litigation. (*Sheldon*

*Appel Co. v. Albert & Olier* (1989) 47 Cal.3d 863, 874.) And the declarations do not support plaintiff's allegation that Gross initiated the trust litigation to "personally benefit[]" and "collect[] attorney's fees."

In finding Gross acted with malice, the trial court relied on Gilbert's declaration. According to the court, Gilbert declared "he witnessed Mr. Gross put the pen in [Angelina's] hand and sign for her even though she was in a catatonic state. Based on this evidence, Mr. Gross had no reasonable cause to believe that [Angelina] had the capacity to execute the testamentary documents. Plaintiff presents evidence of malice. . . . Gilbert[']s . . . declaration indicates that Mr. Gross did not believe the probated documents to be valid." We accept the factual assertions based on Gilbert's personal observations as true: that Angelina was "close to nonresponsive" when Gross arrived in her hospital room, that she signed the first document on her own, that she then "fell into a totally catatonic state," and that Gross helped her sign the remaining documents. But Gilbert's declaration does not support an inference that Gross did not believe the "probated documents to be valid," nor that he initiated the trust litigation for an improper purpose.

Plaintiff offers several arguments in an effort to show Gross acted with malice. For example, plaintiff contends Gross initiated the trust litigation with malice because Ayoubi's claim was "untenable." As we have stated above, the lack of objective tenability does not permit an inference of malice. (*Downey Venture v. LMI Ins. Co.*, *supra*, 66 Cal.App.4th at pp. 498–499.) Plaintiff must offer "additional evidence," which "must include proof of either actual hostility or ill will on the part of the defendant or a subjective intent to deliberately misuse the legal system for personal gain or satisfaction at the expense of the wrongfully sued defendant." (*Ibid.*) In the trust litigation, the lower court considered plaintiff's unopposed evidence and determined the estate planning documents were invalid, but the invalidity of those documents does not establish Gross acted with malice. Malice cannot be inferred merely from an attorney's filing of a case lacking in evidentiary support. (*Daniels, supra*, 182 Cal.App.4th 204; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 743.)

Plaintiff's attempt to cast Ayoubi in an unflattering light does not establish Gross acted with malice. Sharon's declaration may support an inference that Ayoubi had an improper motive for summoning Gross to the hospital, but that motive, if any, does not establish malice because there is no evidence Gross knew, or had reason to know, of Ayoubi's alleged motivation. Angelina told Gross that she and Ayoubi were "very close" and that she was "very pleased" with his care. Gross—who did not know Ayoubi and who had not met Ayoubi until July 12, 2013—had no reason to distrust Angelina's characterization of the relationship. As a result, Sharon's speculation about Ayoubi's motivation does not establish Gross acted with malice. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 931–933.) Second, Ayoubi's improper motivation, if any, cannot be imputed to Gross. "[T]he attorney is not the insurer of his client's conduct, and the law wisely places no such burden on that party's attorney solely by reason of his client's conduct." (See *Daniels, supra*, 182 Cal.App.4th at p. 225.)

Nor are we persuaded by plaintiff's contention that malice exists because Gross did not clear Angelina's "mental status to review and understand probate documents with the [hospital] staff." The evidence plaintiff offered in opposition to the anti-SLAPP motion suggests the opposite—that Gross did not complete the signing of the estate planning documents until Angelina's treating physician confirmed she was able to make decisions for herself. According to the progress note from Angelina's physician, Angelina "was wide awake, following commands, and had complete understanding of her medical condition, including how grave her prognosis was; although she was not able to speak, her acknowledgments at the appropriate times were clear." The physician opined Angelina "ha[d] a clear ability to make decisions for herself."

Plaintiff repeatedly states her burden to establish a probability of prevailing is "minimal." We agree that "plaintiff's burden may not be 'high,' " but she "must demonstrate that [her] claim is legally sufficient." (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 469.) As stated above, "[p]laintiff's demonstration does not measure up." (*Id.* at p. 469.) She failed to make a prima facie showing of malice. (See *Daniels, supra*, 182 Cal.App.4th at p. 227 ["lack of evidentiary

support for the factual allegations in the underlying action; a lack of factual investigation [by the attorneys]”; and “a client who may have had actual ill will against [the plaintiff]” did not support finding of malice].)

We consider Gross’s evidence to determine “ ‘whether it defeats the plaintiff’s showing as a matter of law, such as by establishing . . . the absence of a necessary element.’ ” (*Daniels, supra*, 182 Cal.App.4th at p. 215; *Sweetwater, supra*, 6 Cal.5th at p. 940.) Gross’s detailed declaration describes his “subjective intent in initiating the prior action.” (*Sycamore Ridge Apartments, LLC v. Naumann, supra*, 157 Cal.App.4th at p. 1407.) After their initial meeting, Gross sent the estate planning documents to Angelina. Several weeks later, Angelina told Gross “she was thinking about the documents.” In July, Gross brought the documents to Angelina’s hospital room and told Angelina “the documents were exactly the documents that [he] had sent her for her review.” Gross reviewed the documents with Angelina in the hospital room.<sup>3</sup>

Gross averred he believed Angelina was competent when she signed the will and trust, and that he believed he was helping Angelina accomplish her testamentary wishes by assisting her in the execution of the estate planning documents. Gross’s declaration supports an inference that his motivation for initiating the trust litigation was to fulfill Angelina’s testamentary wishes. The declaration also explains why Gross withdrew as Ayoubi’s attorney—not because the claims lacked merit—but because Gross was “not a litigator” and because he “was a witness to [the] contested events.” Finally, Gross averred he felt no “ill will or animus toward [plaintiff]” and did not “act in any way intended to cause . . . harm.” Gross’s evidence demonstrates a lack of malice.

Plaintiff cites two cases on the element of malice, including *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135. In *Sierra Club*, the defendant challenged the exclusion of evidence he claimed was relevant to the jury’s malice determination. Beyond defining malice in the context of a malicious prosecution claim,

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<sup>3</sup> Gross’s assistant averred Gross “went over each of the documents” with Angelina before they were signed.

*Sierra Club* has no application here, because Gross does not challenge the exclusion of evidence.

Plaintiff's reliance on *Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534 (*Kleveland*) is similarly unavailing. There, the plaintiff petitioned for breach of trust and to remove the trustee. After a multi-week trial, the court issued a statement of decision determining the petition was filed in " 'bad faith' " and for an " 'improper purpose.' " (*Id.* at p. 540.) That decision was affirmed on appeal. (*Id.* at p. 538.) The trustee then filed a malicious prosecution lawsuit against the plaintiffs' attorneys, arguing the trustee could not establish a probability of prevailing on the merits. The trial court denied the attorneys' anti-SLAPP motion. (*Id.* at p. 539.)

On appeal, the *Kleveland* court determined the trustee "easily demonstrated malice." (*Kleveland, supra*, 215 Cal.App.4th at p. 554.) In a one-paragraph discussion of malice, *Kleveland* explained: "[t]he trial court found that the petition for breach of trust and removal was filed with the purpose of forcing a settlement which has no relation to the merits of the claim. Moreover, the trial court found [the plaintiff] had filed and pursued the petition for an 'improper purpose.' As such, there can be no colorable argument that [the trustee] has not shown malice, at least for purposes of defeating the anti-SLAPP motion." (*Ibid.*) In *Kleveland*, no challenge was made to the admissibility of the findings in the underlying judgment.

*Kleveland* is factually and procedurally distinguishable. There, after a multi-week trial, the trial court issued a statement of decision making a specific finding that the underlying action was filed for an improper purpose. That ruling was reviewed and affirmed on appeal. Here, the court held a one-day trial at which neither Gross nor Ayoubi appeared, and where plaintiff's evidence went unopposed. The judgment addressed Angelina's capacity to execute the estate planning documents, but it made no finding with respect to Gross's subjective purpose for initiating the trust litigation. And there was no appeal from the judgment, and no challenge to the admissibility of that judgment in the anti-SLAPP appeal. *Kleveland* has no application here.



In an attempt to show malice, plaintiff relies on the judgment's finding that the estate planning documents were "ineffective and void as they were procured by undue influence." We may not accept as true the judgment's factual findings. " '[N]either a finding of fact made after a contested adversary hearing nor a finding of fact made after any other type of hearing can be indisputably deemed to have been a correct finding. . . . "[U]nder the doctrine of judicial notice, certain matters are assumed to be indisputably true, and the introduction of evidence to prove them will not be required." [Citation.] Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible.' " (*Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1050, fn. 7; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1551.) The judgment does not, as plaintiff contends, establish malice, nor is the judgment entitled to collateral estoppel effect. (*Plumley*, at p. 1050 & fn. 6.)

"[T]he commission of the tort of malicious prosecution requires a showing of an unsuccessful prosecution of a criminal or civil action, which any reasonable attorney would regard as totally and completely without merit [citation], for the *intentionally wrongful purpose of injuring another person.*" (*Downey Venture v. LMI Ins. Co.*, *supra*, 66 Cal.App.4th at pp. 498–499, italics added.) Here, the prosecution of the trust litigation was unsuccessful, but there is no evidence Gross initiated that litigation with malice, i.e., that he deliberately misused the legal system or acted for any purpose other than administering the estate in accordance with Angelina's wishes. Plaintiff's evidence is insufficient as a matter of law to establish malice, and the trial court erred by denying Gross's anti-SLAPP motion. (*Daniels, supra*, 182 Cal.App.4th at p. 227.)

A prevailing defendant is entitled to an award of attorney fees and costs. (§ 425.16, subd. (c).) On remand, the trial court must determine the amount of such fees and costs to be awarded to Gross, including those incurred on appeal. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1426.)

## DISPOSITION

The order denying Gross's anti-SLAPP motion is reversed and the matter is remanded with directions to enter a new order granting Gross's motion and dismissing the malicious prosecution complaint with prejudice. Gross is entitled to recover his attorney fees and costs, including those incurred on appeal, the amounts of which shall be determined by the trial court. (§ 425.16, subd. (c); Cal. Rules of Court, rule 8.278(a)(1).)

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Jones, P.J.

WE CONCUR:

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Needham, J.

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Burns, J.

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